

A **CERGAS TEGAS SDN BHD (IN LIQUIDATION)**

v.

SAP HOLDINGS BHD & ANOR

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
SYED AHMAD HELMY JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: W-02-2105-2011]
C 7 DECEMBER 2012

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Whether trial judge erred in fact and in law*

D **CIVIL PROCEDURE:** *Appeal - Record of appeal - Filing of - Extension of time - Whether negligence of solicitors sufficient ground to grant extension of time - Whether respondents prejudiced by non-compliance - Amendment - Leave to amend intitlement - Whether leave should be granted*

E **CONTRACT:** *Termination - Agreement to sell interests, rights and entitlement under joint venture agreement - Whether terms of JVA read together with supplementary agreements breached - Whether appellant failed to pay balance consideration - Whether agreements lawfully terminated - Whether second supplementary agreement superseded all other agreements - Whether condition precedent in second supplementary agreement failed to be fulfilled*

G SAP Holdings Bhd ('the first respondent') owned a piece of land in Daerah Gombak, Selangor ('the land'). The first respondent entered into a joint venture agreement ('the JVA') with Cergas Tegas Sdn Bhd ('the appellant') to develop the land. Subsequently the parties entered into a supplementary agreement to include additional land situated in the same area into the JVA, *ie*, the first supplementary agreement ('FSA'). On 26 June 1997, the appellant and the first respondent entered into a second supplementary agreement ('SSA'), whereby the first respondent agreed to sell its entire interests, rights and entitlement under the JVA to the appellant for a consideration of RM23.5 million in the amounts and manner as set out in cl. 3 of the SSA. Clause 5 of the SSA
I relieved the appellant of its obligation under the JVA. On

20 August 2002, the first respondent terminated the JVA on the grounds that the appellant had failed to comply with its obligations and carry out the development of the land in accordance with the terms of the JVA. The appellant disputed the termination of the JVA and evinced its intention to complete the purchase of the land pursuant to the SSA. The appellant claimed that it had not breached the terms of the JVA and that the first respondent had not lawfully terminated the agreements. It was the appellant's case that the first respondent had failed to comply with the condition in the SSA, namely to obtain a letter from the appropriate authorities confirming the waiver of the payment of the land premiums. However, the first respondent claimed that all the agreements had been terminated on 20 August 2002. Consequently, the appellant commenced a suit against the first respondent ('the first suit') and prayed essentially for specific performance of the SSA, which it contended had superseded all the other agreements. By way of a counterclaim, the first respondent sought a declaration that the termination of the JVA was valid and also prayed for injunctions and damages. When the appellant learned that the first respondent had proceeded to dispose the land to Star Everest Sdn Bhd ('the second respondent'), the appellant filed a second suit against both respondents. However, it was agreed that the trial should proceed in regard to the first suit and that the decision therein should bind the parties in the second suit. The trial judge held that the first respondent was entitled to terminate the agreements that it had entered into with the appellant. The High Court thus dismissed the appellant's claim with costs, while allowing the first respondent's counterclaim. This was the appellant's appeal against that decision. However, there was a delay of seven days in the appellant's filing of the record of appeal. The appellant thus filed a notice of motion for leave for an extension of time to file its record of appeal. The first respondent objected to the application and submitted *inter alia* that the appellant had failed to amend its capacity in the intitulement after it had been wound up. The appellant applied orally to amend the intitulement and later filed a notice of motion for leave to amend the intitulement.

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A Held (allowing appeal with costs and dismissing the first respondent's counterclaim)

Per Abdul Malik Ishak JCA delivering the judgment of the court:

- B** (1) The appellant should not be faulted for the negligence of its solicitors in not filing the record of appeal within the prescribed time. In any case, the reasons for the delay showed that the appellant did not intend to ignore or flout the rules of court. Further, based on the facts of the present case it
- C** could not be said that the respondents were prejudiced by the delay on the part of the appellant in not filing the record of appeal within the prescribed time. Thus, leave was granted to the appellant for an extension of time to file its record of appeal. (paras 40-45)
- D** (2) The appellant was also granted leave to amend the intitulement, and the amended intitulement was incorporated and reflected in this judgment. (paras 48 & 49)
- E** (3) By considering the JVA, the FSA and the SSA as one single contract to develop the land, the first respondent had overlooked cl. 5 of the SSA, which relieved the appellant of its obligations under the JVA. It was plain that the SSA, which reflected the intention of the contracting parties, was an agreement simpliciter to purchase the land and not to develop
- F** the land as a joint venture. Upon applying an objective exercise, the SSA superseded the JVA and the FSA as the ultimate agreement. By the terms of the SSA it had been expressly agreed that the appellant would, *inter alia*, be released from the obligation to complete the development of
- G** the land pursuant to the JVA. In effect the right to terminate the JVA was expressly removed by cl. 11 of the SSA. Further cl. 21 of the SSA expressly stated that the SSA superseded all other agreements and correspondences. (paras 74-79, 138 & 139)
- H** (4) The evidence adduced confirmed that all payments due under cl. 3 of the SSA had been paid and what was left unpaid was the balance consideration due after the fulfillment of the condition precedent in cl. 3(v)(a). According to cl. 3(v)(a) of
- I** the SSA, the balance of the consideration sum was only payable upon the first respondent obtaining a written waiver in respect of the payment of the land premiums from the

- appropriate authorities. Although the trial judge had recognised the effect of cl. 3(v)(a) of the SSA, he misconstrued the documentary evidence tendered by the first respondent as being in compliance with the said clause. The evidence showed that it was the first respondent's fault in not procuring the written confirmation from the appropriate authorities confirming the waiver of the payment of the land premiums. In the circumstances, the appellant was not in breach of the agreements and the SSA was still binding until the first respondent fulfilled the condition in the said cl. 3(v)(a). (paras 87-90, 111, 135 & 136)
- (5) The present case was an appropriate case for appellate intervention. The trial judge had erred in fact and in law when he, *inter alia*, failed to place sufficient weight on the fact that the parties had embarked on and part performed the SSA; failed to judicially consider the totality of the evidence which showed that the parties had abandoned their respective rights, duties and obligations under the JVA; and failed to judicially consider that the true motive of the first respondent in terminating the JVA was to dispose the land to the second respondent. (paras 145 & 146)
- (6) Based on the evidence, the first respondent's notice of termination dated 20 August 2002, terminating the JVA, the FSA and the SSA, was bad or wrong in law. The first respondent was thus ordered to deliver vacant possession of the land to the appellant upon receipt of the balance of the purchase price from the appellant. In addition to specific performance of the SSA, the appellant was also entitled to damages and an injunction restraining the first respondent from disposing the land to the second respondent. (paras 150, 151 & 153)

Bahasa Malaysia Translation Of Hednotes

SAP Holdings Bhd ('defendan pertama') memiliki sebidang tanah di Daerah Gombak, Selangor ('tanah tersebut'). Responden pertama memasuki perjanjian usahasama ('PU') dengan Cergas Tegas Sdn Bhd ('perayu') untuk membangunkan tanah tersebut. Kemudian, pihak-pihak memasuki perjanjian tambahan untuk memasukkan tanah tambahan yang terletak di kawasan yang sama ke dalam PU iaitu perjanjian tambahan pertama ('PT1'). Pada 26 Jun 1997, perayu dan responden pertama memasuki perjanjian tambahan

- A kedua ('PT2'), di mana responden pertama bersetuju menjual kesemua kepentingan, hak-haknya di bawah PU kepada perayu bagi balasan sebanyak RM23.5 juta dalam jumlah dan cara yang dikemukakan dalam kl. 3 PT2. Klausa 5 PT2 membebaskan perayu daripada kewajipannya di bawah PU. Pada 20 Ogos 2002,
- B responden pertama menamatkan PU atas alasan bahawa perayu telah gagal mematuhi kewajipannya dan menjalankan pembangunan tanah tersebut menurut terma-terma PU. Perayu mempertikaikan pembatalan PU dan menyatakan niatnya untuk menyelesaikan pembelian tanah tersebut menurut PT2. Perayu menghujahkan
- C bahawa ia tidak melanggar terma-terma PU dan bahawa responden pertama tidak membatalkan perjanjian-perjanjian tersebut secara sah. Kes perayu adalah bahawa responden pertama telah gagal mematuhi syarat dalam PT2, iaitu untuk memperolehi surat daripada pihak berkuasa yang berkenaan mengesahkan
- D pengecualian bayaran premium tanah tersebut. Walau bagaimanapun, responden pertama menghujahkan bahawa kesemua perjanjian telah ditamatkan pada 20 Ogos 2002. Oleh itu, perayu telah memulakan suatu guaman terhadap responden pertama ('guaman pertama') dan memohon, pada asasnya, untuk
- E pelaksanaan spesifik PT2, yang dihujahkan telah menggantikan kesemua perjanjian lain. Melalui tuntutan balas, responden pertama memohon deklarasi bahawa pembatalan PU adalah sah dan juga memohon injuksi dan ganti rugi. Apabila perayu mengetahui bahawa responden pertama telah meneruskan untuk melupuskan
- F tanah tersebut kepada Star Everest Sdn Bhd ('responden kedua'), perayu memfailkan guaman kedua terhadap kedua-dua responden. Walau bagaimanapun, adalah dipersetujui bahawa perbicaraan hanya perlu diteruskan berkaitan dengan guaman pertama dan keputusannya akan mengikat pihak-pihak dalam guaman kedua.
- G Hakim bicara memutuskan bahawa responden pertama berhak menamatkan perjanjian-perjanjian tersebut kerana ia telah dimasuki dengan perayu. Mahkamah Tinggi, oleh itu, menolak tuntutan perayu dengan kos sementara membenarkan tuntutan balas responden pertama. Ini adalah rayuan perayu terhadap keputusan
- H tersebut. Walau bagaimanapun, terdapat kelewatan tujuh hari dalam pemfailan rekod rayuan perayu. Perayu, oleh itu, memfailkan notis usul memohon kebenaran untuk melanjutkan masa untuk memfailkan rekod rayuan. Responden pertama membantah permohonan kebenaran oleh perayu dan menghujahkan, antara lain,
- I bahawa perayu telah gagal meminda kapasitinya dalam intitulen

selepas ia digulungkan. Perayu memohon secara lisan untuk meminda intitulmen dan kemudian memfailkan notis usul untuk kebenaran meminda intitulmen.

Diputuskan (membenarkan rayuan dengan kos dan menolak tuntutan balas responden pertama)

Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Perayu tidak boleh dipersalahkan atas kecuaian peguamcaranya yang tidak memfailkan rekod rayuan dalam tempoh yang ditetapkan. Walau apapun, alasan-alasan bagi kelewatan menunjukkan bahawa perayu tidak berniat untuk tidak mengendahkan atau melanggar peraturan mahkamah. Selanjutnya, berdasarkan kepada fakta-fakta kes ini, tidak boleh dikatakan bahawa responden-responden diprejudiskan oleh kelewatan pada pihak perayu dalam kegagalan memfailkan rekod rayuan dalam tempoh yang ditetapkan. Dengan itu, kebenaran diberikan kepada perayu untuk melanjutkan masa untuk memfailkan rekod rayuan.

(2) Perayu juga diberikan kebenaran untuk meminda intitulmen tersebut, dan intitulmen yang dipinda dimasukkan dan ditunjukkan dalam penghakiman ini.

(3) Mempertimbangkan PU, PT1 dan PT2 sebagai satu kontrak tunggal untuk memajukan tanah tersebut, responden pertama telah terlepas pandang kl. 5 PT2, yang melepaskan perayu daripada kewajipannya di bawah PU. Jelas bahawa PT2, yang menggambarkan niat pihak-pihak yang berkontrak, adalah perjanjian simplisiter untuk membeli tanah tersebut dan bukan untuk memajukan tanah tersebut sebagai usahasama. Mengguna pakai pelaksanaan objektif, PT2 menggantikan PU dan PT1 sebagai perjanjian utama. Melalui terma-terma PT2, adalah jelas dipersetujui bahawa perayu akan, antara lain, dilepaskan daripada kewajiban untuk menyelesaikan pemajuan tanah tersebut menurut PU. Pada hakikatnya, hak untuk membatalkan PU adalah jelas dilucutkan oleh kl. 11 PT2. Selanjutnya, kl. 21 PT2 menyatakan dengan jelas bahawa PT2 menggantikan kesemua perjanjian dan surat menyurat lain.

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- A (4) Keterangan yang dikemukakan mengesahkan bahawa kesemua
bayaran yang tertunggak di bawah kl. 3 PT2 telah dibayar dan
apa yang masih belum dibayar adalah baki balasan tertunggak
selepas pemenuhan syarat awalan dalam kl. 3(v)(a). Menurut
kl. 3(v)(a) PT2, baki jumlah balasan hanya perlu dibayar
B selepas responden pertama memperolehi pengecualian secara
bertulis berkaitan dengan bayaran premium tanah daripada
pihak-pihak berkuasa yang berkenaan. Walaupun hakim bicara
telah mengakui kesan kl. 3(v)(a) PT2, beliau telah tersalah
C tanggap keterangan dokumentar yang dikemukakan oleh
responden kedua sebagai mematuhi klausa tersebut.
Keterangan menunjukkan bahawa ia adalah silap responden
pertama dalam tidak mendapatkan pengesahan bertulis daripada
pihak berkuasa yang berkenaan bagi mengesahkan pengecualian
pembayaran premium tanah. Dalam keadaan tersebut, perayu
D tidak melanggar perjanjian-perjanjian tersebut dan PT2 masih
mengikat sehingga responden kedua memenuhi syarat kl.
3(v)(a) tersebut.
- (5) Kes ini adalah kes yang wajar untuk campur tangan rayuan.
E Hakim bicara telah terkhilaf dalam fakta dan undang-undang
apabila beliau, antara lain, gagal mempertimbangkan dengan
sewajarnya fakta bahawa pihak-pihak telah memulakan dan
melaksanakan sebahagian PT2; gagal memberikan pertimbangan
secara kehakiman keseluruhan keterangan yang menunjukkan
F bahawa pihak-pihak telah meninggalkan hak-hak, tugas dan
kewajipan masing-masing di bawah PU; dan gagal memberikan
pertimbangan secara kehakiman bahawa motif sebenar
responden pertama dalam membatalkan PU adalah untuk
melupuskan tanah tersebut kepada responden kedua.
- G (6) Berdasarkan keterangan, notis pembatalan responden pertama
bertarikh 20 Ogos 2002, membatalkan PU, PT1 dan PT2
adalah cacat atau salah di sisi undang-undang. Responden
pertama, oleh itu, diperintahkan menyerahkan milikan kosong
tanah tersebut kepada perayu selepas penerimaan baki harga
H belian daripada perayu. Tambahan kepada pelaksanaan spesifik
PT2, perayu juga berhak untuk ganti rugi dan injunksi
menghalang responden pertama daripada melupuskan tanah
tersebut kepada responden kedua.

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Case(s) referred to:

Abd Hamid Jaafar v. Shamsiah Dan Keluarga Sdn Bhd [2004] 5 CLJ 381 HC (refd) A

Arab Malaysian Finance Bhd v. Kah Motor Co Sdn Bhd & Another Case [2010] 1 LNS 359 CA (refd)

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC (refd) B

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC (refd)

Azlan Shah Ahmad v. Kewangan Bersatu Bhd [2002] 5 CLJ 373 HC (refd)

Batcha Ammal v. Ponnachi [1965] 1 LNS 11 FC (foll)

Cosway (M) Sdn Bhd & Anor v. Gan Poh Im [2005] 1 CLJ 573 CA (refd) C

Equitable Life Assurance Society v. Hyman [2000] 3 All ER 961 (refd)

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC (refd)

Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA (refd)

Head v. Tattersall [1871] LR 7 & Ex 7 (refd)

Investors Compensation Scheme Ltd v. West Bromwich Building Society; Investors Compensation Scheme Ltd v. Hopkin & sons (A Firm) And Others [1998] 1 WLR 896 (refd) D

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC (refd)

John Denis de Silva v. Crescent Court Management Corporation [2006] 2 CLJ 605 HC (refd) E

Lim Kee Tiak v. Lim Kee Tian [1986] 1 LNS 15 HC (refd)

Lim Yee Teck & Ors v. Shell (M) Trading Sdn Bhd [1986] 2 CLJ 104; [1986] CLJ (Rep) 13 PC (refd)

Md Amin Md Yusof & Satu Lagi lwn. Cityvilla Sdn Bhd [2004] 2 CLJ 57 CA (refd) F

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 (JT 2/02) FC (refd)

Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653 (refd)

New Zealand Shipping Company, Ltd v. Societe Des Ateliers Et Chantiers De France [1919] AC 1 (refd) G

Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Another Cases [2008] 1 LNS 669 CA (refd)

Pioneer Shipping Ltd And Others v. BTP Tioxide Ltd [1982] AC 724 (refd)

Poon Guan Sdn Bhd v. Sem Siong Industries Sdn Bhd [1983] 2 CLJ 208; [1983] CLJ (Rep) 326 FC (refd)

Public Bank Bhd v. Lee Kin Mio & Anor [2006] 1 CLJ 630 HC (refd) H

Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors [1982] 1 LNS 11 FC (refd)

Sin Hai Estate Berhad & 3 Ors v. Lim Jit Kim @ Lim Tian Jee & 19 Ors [2003] 1 LNS 16 HC (refd) I

- A** *Sirius International Insurance Co (Publ) v. FAI General Insurance Ltd [2004] 1 WLR 3251 (refd)*
The Chartered Bank v. Yong Chan [1974] 1 LNS 178 FC (refd)
Yeo Brothers Co (Pte) Ltd v. Atlas Properties (Pte) Ltd [1987] 1 LNS 89 HC (refd)
- B** *Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC (refd)*
Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC (refd)

Legislation referred to:

- C** Courts of Judicature Act 1964, s. 25(2)
Powers of Attorney Act 1949, s. 6
Rules of the Court of Appeal 1994, rr. 18(7), 21(1), 41, 42, 102, 103, 104
Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 41 r. 5
- D** *For the appellant/plaintiff - K Kirubakaran (Mark Ho with him); M/s Chellam Wong*
For the 1st respondent - Murad Ali Abdullah (Amuthavally Krishnan Nair with him); M/s K Mura & Co
For the 2nd respondent - Mohammed Azuan Md Arif; M/s Ricky Tan & Co
- E** *[Appeal from High Court, Kuala Lumpur; Suits No: S2-22-185-2004 & S6-22-280-2006]*
Reported by Vani Krishnan

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JUDGMENT

Abdul Malik Ishak JCA:

G The Session On 17 July 2012

[1] During this session we heard two enclosures, namely: encl. 5a and encl. 6a. Enclosure 5a is a notice of motion where the applicant/appellant pursuant to r. 21(1) of the Rules of the Court of Appeal 1994 (“RCA”) and/or under the inherent jurisdiction of

H this court sought for the following prayers:

- (1) that leave be granted to amend the Notice of Appeal dated 9.8.2011 by amending it as underlined in red in the proposed Amended Notice of Appeal hereby produced and marked as ‘Annexure A’ attached together herein with this Notice of Motion;

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- (2) that the costs of this application be costs in the cause; and **A**
- (3) any further and/or other relief that this Honourable Court may consider appropriate.

[2] Dato' K Kirubakaran with Mr Mark Ho who both acted as counsel for the applicant/appellant informed us that Mr Murad Ali bin Abdullah with Madam Amuthavally Krishnan Nair who both acted as counsel for the first respondent and mentioning for the second respondent had no objections to the prayers sought for in encl. 5a. Having confirmed with Mr Murad Ali bin Abdullah about that concession, we gave order in terms of encl. 5a for prayers (1) and (2). That disposes off encl. 5a. **B**
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[3] Now, encl. 6a is also a notice of motion where the applicant/appellant pursuant to s. 25(2) of the Courts of Judicature Act 1964 (Schedule, para. 8) and r. 18(7) of the RCA and/or under the inherent jurisdiction of this court sought for the following prayers: **D**

- (1) that leave be granted to the appellant for an extension of time to file its Record of Appeal dated 11.10.2011 and Supplementary Record of Appeal dated 16.1.2012 out of time; **E**
- (2) that the costs of this application be borne by the appellant; and
- (3) any further and/or other relief that this Honourable Court may consider appropriate. **F**

[4] Enclosure 6a was contested. Submissions were made before us.

[5] To date, the second respondent has not filed an affidavit in opposition. **G**

[6] But the first respondent through its director had affirmed an affidavit in reply on 11 July 2012 as seen in encl. 14 which was filed and served on 12 July 2012. Enclosure 14 is in fact an affidavit in opposition to both encls. 5a and 6a (hereinafter referred to as the "first respondent's affidavit"). A perusal of the first respondent's affidavit revealed the following pertinent averments: **H**
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- A** (a) the averment that the applicant/appellant had filed the record of appeal for Civil Appeal No: W-02-2105-2011 on 11 October 2011 and the supplementary record of appeal on 16 January 2012 without the leave of the President of the Court of Appeal and/or this Honourable Court and, consequently, encl. 6a
- B** was filed to seek an extension of time to regularise the appeal record and the supplementary record of appeal out of time;
- (b) the averment that the applicant/appellant has been wound up and that the applicant/appellant has failed to amend its capacity in the intitulement; and
- C** (c) the averment that the first respondent's objection is confined and related only to the non-compliance of the appeal records.
- D** [7] On 22 February 2008, the parties agreed to a consolidation of both suits, namely the Kuala Lumpur High Court Suit No: S2-22-185-2004 and the Kuala Lumpur High Court Suit No: S6-22-280-2006 together and that the Kuala Lumpur High Court Suit No: S2-22-185-2004 shall be the main suit.
- E** [8] The trial before the learned Judicial Commissioner ("JC") proceeded smoothly and on 4 August 2011, His Lordship delivered his decision and dismissed the applicant/appellant's claim with costs and allowed the first respondent's counter-claim in the Kuala Lumpur High Court Suit No: S6-22-280-2006 with damages
- F** to be assessed by the Senior Assistant Registrar.
- [9] On 9 August 2011, the applicant/appellant filed a notice of appeal (the "first notice of appeal") against the decision of the learned JC dated 4 August 2011.
- G** [10] On 12 August 2011, the parties appeared before the learned JC for a clarification in regard to the draft order dated 4 August 2011 which was amended by the applicant/appellant's counsel. The clarification was sought for by the first respondent's counsel by letter dated 9 August 2011 as seen in exh. "CTSB-1"
- H** of the affidavit in support of Lim Chin Chye who affirmed the said affidavit on 17 January 2012 as a director of the applicant/appellant.
- I** [11] On 16 August 2011, the applicant/appellant filed another notice of appeal (the "second notice of appeal") on the assumption that the clarification by the learned JC on 12 August 2011 was

the actual date of the decision. The second notice of appeal was filed soon after the clarification by the learned JC on 16 August 2011. A

[12] On 11 October 2011, the applicant/appellant filed the record of appeal. B

[13] On 16 January 2012, the applicant/appellant filed the supplementary record of appeal containing the memorandum of appeal and the grounds of judgment.

[14] The last day to file the record of appeal was on 4 October 2011. And since the record of appeal was filed on 11 October 2011, there was a delay of seven days in filing the record of appeal. C

[15] Through the affidavit in support affirmed by Lim Chin Chye on 17 January 2012, the reason for the delay in filing the record of appeal by seven days was said to be caused by the confusion between the dates of the filing of the first notice of appeal and the second notice of appeal. D

[16] The supplementary record of appeal containing the memorandum of appeal and the grounds of judgment can only be filed after the grounds of judgment had been provided by the learned JC bearing in mind that the action was decided after a full trial. And the grounds of judgment was only received on 7 December 2011. E
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[17] The first respondent's affidavit in opposition in encl. 14 did not state that the first respondent was prejudiced and how the first respondent was prejudiced by the non-compliance by the applicant/appellant to the rules. G

[18] The applicant/appellant acknowledged that it had breached the practice direction requiring the applicant/appellant, in an appeal after full trial, to seek for an administrative extension of time from the President of the Court of Appeal. But learned counsel for the applicant/appellant submitted that such non-compliance is technical in nature and it has not prejudiced the respondents in any way. According to learned counsel for the applicant/appellant, it was the mistake of the previous solicitors who did not obtain the administrative extension from the President of the Court of Appeal. Learned counsel for the applicant/appellant also H
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- A emphasised that encls. 5a and 6a were served on the respondents and their respective counsel had appeared in court on 28 March 2012 and 13 April 2012 and yet nothing were said about them being prejudiced by such non-compliance. Undaunted, learned counsel for the applicant/appellant also submitted that the
- B respondents did not file any application to strike out the applicant/appellant's appeal to this court.

- [19] Learned counsel for the applicant/appellant also submitted that he has a meritorious appeal and that the mistake of the
- C previous solicitors should not be used as a reason to penalise the applicant/appellant in advancing its appeal.

- [20] Finally, learned counsel for the applicant/appellant prayed for an order in terms of encl. 6a and that the applicant/appellant be asked to pay costs of RM5,000.
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- [21] By way of a rebuttal, learned counsel for the first respondent submitted as to the capacity of the applicant/appellant. He drew our attention to the fact that on 20 January 2012 the applicant/appellant was wound up by the chargee bank. He also
- E drew our attention to r. 41 and r. 42 of the RCA and he stressed that the capacity of the applicant/appellant is an important factor in the equation before the appeal is being heard. He submitted that the capacity of the applicant/appellant should be styled as "Cergas Tegas Sdn Bhd (Dalam Likuidasi) No Syarikat 198482-M)". He pointed out that if the capacity of the applicant/appellant is not corrected, how could the order be extracted and executed?
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- [22] In regard to the administrative extension of time from the President of the Court of Appeal, learned counsel for the first
- G respondent urged us to insist that strict compliance to it should be imposed and adhered to religiously. He also submitted that the application in encl. 6a was not filed expeditiously. He pointed out that the notes of evidence were ready since the judgment was given, yet the supplementary record of appeal containing the
- H memorandum of appeal and the grounds of judgment was filed on 16 January 2012. He stressed that the compact disc read-only memory (CD-ROM) was always available and that the notes of evidence were mutually agreed. However, he admitted that the grounds of judgment of the learned JC was only received by the
- I applicant/appellant on 7 December 2011.

[23] Learned counsel for the first respondent urged us to dismiss encl. 6a with costs of RM5,000. However, he magnanimously submitted that if this court were to allow encl. 6a, then the appeal proper will be heard. Nevertheless, he pointed out that the capacity of the applicant/appellant was not in order.

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[24] By way of a rebuttal, learned counsel for the applicant/appellant referred us to the case of *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785, a decision of the Federal Court where Gopal Sri Ram FCJ writing separately for the Federal Court said (see the headnote at p. 787, held no: (1)):

B

C

Once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. Once authority is given either by the liquidator or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question.

D

[25] Alternatively, learned counsel for the applicant/appellant submitted that if there is a requirement for him to move the court to change the capacity of the applicant/appellant, he now wishes to apply orally to change the capacity of the applicant/appellant. He then made reference to r. 102 of the RCA which reads as follows:

E

102. Non-compliance with Rules not to render proceedings void.

F

Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

G

[26] Again, learned counsel for the applicant/appellant applied orally to amend the intitulement to read:

CERGAS TEGAS SDN BHD (DALAM LIKUIDASI)

H

(NO: SYARIKAT 198482-M).

[27] It was, according to learned counsel for the applicant/appellant, a mere technicality and that the applicant/appellant be condemned with costs. He asked that encl. 6a be allowed.

I

A [28] Now, apart from r. 102 of the RCA which has been reproduced earlier, there are rr. 103 and 104 of the RCA which should be referred to and these rules will now be reproduced. Rule 103 of the RCA reads as follows:

B 103. Application to set aside for irregularity when allowed.

No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

C [29] While r. 104 of the RCA is worded in this way:

104. Objections of irregularity.

D When an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion.

E [30] It cannot be denied that rr. 102, 103 and 104 of the RCA are similar in effect to that of O. 1A of the Rules of the High Court 1980 (“RHC”) and O. 2 r. 3 of the RHC. For convenience, O. 1A of the RHC is now reproduced:

ORDER 1 A

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

F In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

G [31] For convenience too, O. 2 r. 3 of the RHC will now be reproduced:

H 3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

I [32] The court will have regard by virtue of O. 1A of the RHC and O. 2 r. 3 of the RHC to the justice of the particular case and to determine judicially whether the non-compliance with the rules had occasioned a substantial miscarriage of justice.

[33] Abdul Malik bin Ishak J (now JCA) in *Sin Hai Estate Berhad & 3 Ors v. Lim Jit Kim @ Lim Tian Jee & 19 Ors* [2003] 1 LNS 16; [2003] 2 AMR 336 after referring to O. 1A of the RHC and O. 2 r. 3 of the RHC had this to say (see p. 342 of the report):

In essence, these amendments to the RHC allow the court to have 'regard to the justice of the particular case' and to determine whether the non-compliance with the rules 'has occasioned a substantial miscarriage of justice'. These amendments to the RHC would certainly allow me to receive as evidence the affidavit in encl. 18 and to consider the same in the course of adjudicating encl. 15. I must have regard to the justice of the case and it was part and parcel of my judgment that there was no miscarriage of justice when this court considered and took into account encl. 18. At any rate, the non-compliance with the rules was certainly curable under Order 2 r. 1 of the RHC and I so hold accordingly. The Federal Court, in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 AMR 1089; [2002] CLJ JT (2) 1, was unduly concerned that justice should be done. At p. 1153 (AMR); p. 40 (CLJ) of the report, Mohtar Abdullah FCJ said:

The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the court is seised of jurisdiction over the case. So seised, the Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

Justice seems to be the hallmark and the only reason to overcome any technical impediment. And when justice is used as a basis to overcome any 'technical non-compliance' with the rules, the result would be obvious. That encl. 18 will be read to adjudicate encl. 15.

'Justice', is a word that is often bandied around in the courts. It is a word with a strong emotional appeal. It has no precise meaning assigned to it. The meaning which is frequently associated with the word 'justice' is 'fairness'. 'Fairness' must denote 'justice' according to law. A litigant, for instance, may consider that the RHC may operate unfairly in his favour but the judge must base his decision upon the facts and the law. The whole system of justice proceeds on the basis that the truth is to be ascertained.

I

- A [34] It merits repetition to quote the speech of the late Mohtar Abdullah FCJ in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 AMR 1089; [2002] 1 CLJ 645, p. 690; [2002] 1 MLJ 385, p. 426:
- B Rules are rules! They must be obeyed. Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence to the rules. I agree. However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law.
- C [35] In *John Denis de Silva v. Crescent Court Management Corporation* [2006] 2 CLJ 605, p. 610; [2006] 3 MLJ 631, p. 638, Abdul Malik bin Ishak J (now JCA) held that:
- D Order 1A of the RHC must be read with Order 2 rule 1(1) of the RHC as well as with Order 2 rule 3 of the RHC and, when so read, the preliminary objection advanced by the defendant would come to naught. Of pertinence would be the need to have regard to the justice of the particular case and not to be shackled by any technical non-compliance of any of the rules of the RHC.
- E [36] Low Hop Bing J (later JCA) in *Public Bank Bhd v. Lee Kin Mio & Anor* [2006] 1 CLJ 630; [2006] 3 MLJ 47 rightly held that under O. 2 r. 3 of the RHC, a court or judge shall not allow any preliminary objection by any party to any cause, matter, or
- F proceedings only on the ground of non-compliance with any of the provisions of the RHC unless the court or judge is of the opinion that such non-compliance had occasioned a substantial miscarriage of justice.
- G [37] Again, Abdul Malik bin Ishak J (now JCA) in *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653 echoed the same sentiments like what was expressed by Low Hop Bing J (later JCA) in *Public Bank Bhd v. Lee Kin Mio & Anor* (*supra*).
- H [38] Finally, Low Hop Bing J (later JCA) in *Abd Hamid Jaafar v. Shamsiah Dan Keluarga Sdn Bhd* [2004] 5 CLJ 381; [2004] 5 MLJ 349 held that the petitioner's objection to the admissibility of an affidavit for alleged non-compliance with the requirements of O. 41 r. 5 of the RHC was strictly a technical objection and
- I which has been superseded by the amendments to the RHC with

the introduction of O. 1A of the RHC and O. 2 r. 3 of the RHC and, consequently, His Lordship overruled the petitioner's objection. At p. 357 of the report, His Lordship aptly said:

It is clearly the intention and the wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

[39] It must be emphasised that in *Sin Hai Estate Berhad & 3 Ors v. Lim Jit Kim @ Lim Tian Jee & 19 Ors (supra)*, the High Court Judge considered that the plaintiff's delay of almost three months in filing an affidavit in response to the defendant's application to set aside the suit did not constitute a substantial miscarriage of justice. Here, there was a delay of seven days in filing the record of appeal. In our judgment, where the technicalities raised are strictly confined to non-compliance, disregarding and ignoring those technicalities would not occasion any miscarriage of justice.

[40] In our judgment, the applicant appellant should not be faulted by the negligence of its solicitors in not filing the appeal record within the prescribed time. In *Md Amin Md Yusof & Satu Lagi lwn. Cityvilla Sdn Bhd* [2004] 2 CLJ 57 there was a delay of 21 months in not filing the appeal record due to the fault of the solicitors and this court allowed the first applicant/appellant there leave to file the appeal record out of out of time. Writing for this court, Nik Hashim, JCA (later FCJ) aptly said at p. 61 of the report:

Kami dapati memang benar pihak perayu telah lewat 21 bulan tidak memfailkan rekod rayuan akan tetapi kelewatan itu tidak pula berlaku tanpa alasan. Sebenarnya kelewatan itu telah disebabkan oleh peguam tersebut dan bukannya perayu-perayu sendiri. Dalam pertemuan antara Gee Siew Yee bagi pihak perayu pertama dengan peguam tersebut pada 17 Februari 2001, peguam tersebut telah memberitahu Gee Siew Yee tentang perkembangan guaman tersebut dan memberi jaminan bahawa semuanya adalah teratur dan tiada apa yang perlu dibimbangkan (sila lihat afidavit

- A sokongan Gee Siew Yee di perenggan 8). Perayu-perayu tidak mengetahui pembatalan terhadap tuntutan balas mereka pada 7 Disember 2001 sehinggalah dia diberitahu oleh Tham pada 24 Julai 2003 (sila lihat affidavit sokongan Gee Siew Yee di perenggan 9). Walaupun notis rayuan telah difailkan pada 2 Januari 2002 terhadap pembatalan itu, peguam tersebut telah gagal memfailkan rekod rayuan dalam masa selepas itu. Dalam keadaan kes ini, perayu-perayu tidak boleh dipersalahkan atas kecuaiannya sebagai peguam untuk memfailkan rekod rayuan dalam masa yang dikehendaki.
- B

- [41] Again, the appellants in *Cosway (M) Sdn Bhd & Anor v. Gan Poh Im* [2005] 1 CLJ 573 were not faulted by this court because the non-compliance was due to the mistake of the former solicitors of the appellants. Arifin Zakaria JCA (now Chief Justice) writing for this court, succinctly said at p. 588 of the report:
- C

- D In the present case, the application is only for extension of time to file and serve the memorandum of appeal. The appeal record had been filed earlier within the stipulated time. Even the memorandum of appeal had been filed earlier together with the appeal record, *albeit* erroneously. After realising the error, the appellants' solicitors filed the memorandum of appeal out of time and this application, even though made after the notice of preliminary objection, was merely to regularise the filing and service of the memorandum of appeal. In the circumstances, we do not think that the conduct of the appellants' solicitors could be regarded as a blatant disregard of the rules of court. There was indeed a misapprehension of the rules of court but remedial steps were taken to comply with the rules. As stated by this court in *Thiruchelvasegaram a/l Manickavasegar v. Mahadevi a/p Nadchatiram* [1998] 4 CLJ 883, the primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.
- E
- F
- G

Further, we are of the view that there are merits in this appeal.

- [42] Likewise here, the reasons for the delay were:

- H (a) the confusion that arose between the dates of the filing of the first notice of appeal and the second notice of appeal; and
- I (b) the mistake on the part of the previous solicitors who did not obtain the administrative extension from the President of the Court of Appeal.

[43] It cannot be denied that since the respondents were served with the notice of appeal, it can be surmised that the respondents knew all along that the decision of the learned JC was being appealed against. And since learned counsel for the respective respondents attended this court on 28 March 2012 and 13 April 2012, it cannot be said that the respondents were prejudiced by the delay on the part of the applicant/appellant in not filing the record of appeal within the prescribed time (*Azlan Shah Ahmad v. Kewangan Bersatu Bhd* [2002] 5 CLJ 373).

[44] We are aware that the merits of the applicant/appellant's appeal are set out in the affidavit in support (no. 2) of Heng Ji Keng which was affirmed on 16 July 2012 and marked as encl. 13. In fact, encl. 13 responded to encl. 14 which was the first respondent's affidavit in reply affirmed by its director on 11 July 2012, as alluded to earlier.

[45] For these varied reasons, we unanimously allowed encl. 6a with costs of RM5,000 to be borne by the applicant/appellant.

[46] Thereafter, we heard the oral submission of learned counsel for the applicant/appellant on the merits of the appeal. For want of time, we adjourned the session to 5 October 2012.

The Session On 5 October 2012

[47] In abundance of caution, the applicant/appellant filed a notice of motion marked as encl. 16a pursuant to r. 21(1) of the RCA and/or under the inherent jurisdiction of this court and sought for the following prayers:

- (1) Leave be granted to amend the intitulement of the notice of appeal, memorandum of appeal and the record of appeal by amending it to 'Cergas Tegas Sdn Bhd (In Liquidation)' to reflect the current status of the applicant/appellant.
- (2) From the date of this Order, the intitulement on the notice of appeal, memorandum of appeal and the record of appeal all filed herein shall be treated as amended in accordance with prayer (1) above.
- (3) The applicant/appellant is exempted from filing fresh notice of appeal, memorandum of appeal and record of appeal.
- (4) That the costs of this application be costs in the cause.
- (5) Any further and/or other relief that this Honourable Court may consider appropriate.

- A [48] We are fortunate that learned counsel for both the respondents agreed to the prayers sought for in encl. 16a. For the record, Mr Mohamed Azuan bin Md. Arif, learned counsel represented the second respondent. We then gave order in terms of encl. 16a prayers (1), (2) and (3). Agreed costs of RM2,000 in
B favour of the first respondent. And no order as to costs in regard to the second respondent.

[49] The capacity of the applicant/appellant is now incorporated and reflected in the intitlement to this judgment.

C **The Facts And The Analysis Thereto**

[50] In narrating the facts, the applicant/appellant will be referred to as “Cergas Tegas” while the first respondent as “SAP” and the second respondent as “Star Everest”.

- D [51] During the trial, Cergas Tegas called one witness whilst SAP called three witnesses.

E [52] Cergas Tegas was the plaintiff in two civil suits before the High Court, namely:

- (a) Civil Suit No: S2-22-185-2004 (hereinafter referred to as the “185 suit”); and
F (b) Civil Suit No: S6-22-280-2006 (hereinafter referred to as the “280 suit”).

[53] SAP was the defendant in the 185 suit while SAP and Star Everest were the defendants in the 280 suit.

- G [54] Before the learned JC, the parties agreed that the trial should proceed in regard to the 185 suit and the decision therein should bind the parties in the 280 suit. It must be emphasised that there was an order of the court dated 22 February 2008 which showed that the 280 suit was consolidated with the 180 suit. In its counter-claim, SAP sought for declaration that the
H termination of the joint venture agreement (hereinafter referred to as the “JVA”) is valid and proper and SAP also prayed for injunctions and damages.

I

[55] The subject matter of the two suits concerned a piece of land owned by SAP *vide* land title held under HS(D) 20034, No: PT 26549 Mukim Batu, Daerah Gombak, Negeri Selangor measuring approximately 235.76 acres (hereinafter referred to as “the said land”).

A

[56] In order to develop the said land, SAP entered into the JVA with Cergas Tegas. That JVA was dated 12 January 1991 and it can be seen at pp. 476 to 508 of the appeal record C-1.

B

[57] And in order to facilitate the JVA, an irrevocable power of attorney (hereinafter referred to as “PA”) dated 28 August 1991 was executed by SAP in favour of Cergas Tegas. And the PA can be seen at pp. 509 to 515 of the appeal record C-1.

C

[58] On 13 July 1992, a supplementary agreement was entered between SAP and Cergas Tegas wherein an additional land owned by SAP from the same land title *vide* HS(D) 20034, No: PT 26549 Mukim Batu, Daerah Gombak, Negeri Selangor measuring approximately 30.7 acres (hereinafter referred to as the “additional land”) was added into the JVA (hereinafter referred to as the “first supplementary agreement”). The first supplementary agreement can be seen at pp. 516 to 521 of the appeal record C-1. In reality, the additional land has been incorporated as part and parcel of the said land and its acreage comes up to 235.76 acres as reflected in the same land title that can be seen at pp. 524 to 526 of the appeal record C-1. And Cergas Tegas is interested in the said land and wants the said land to be registered in its name.

D

E

F

[59] On 26 June 1997, SAP and Cergas Tegas entered into another supplementary agreement (hereinafter referred to as the “second supplementary agreement”). By this second supplementary agreement, SAP agreed to sell its entire interests, rights and entitlement under the JVA to Cergas Tegas for a consideration of RM23,500,000 (hereinafter referred to as “the consideration”). The second supplementary agreement can be seen at pp. 527 to 535 of the appeal record C-1.

G

H

[60] Recital 8 to the second supplementary agreement states that, “SAP is desirous of disposing of their entire interest rights and entitlement under the JVA to CT”. CT refers to Cergas Tegas.

I

A [61] The relevant clauses in the second supplementary agreement will now be reproduced. Clause 2 of the second supplementary agreement reads as follows:

B 2. SAP ENTITLEMENT UNDER THE JVA - DISPOSAL
FOR CONSIDERATION

C SAP hereby agrees to dispose of its entire interest rights benefits and entitlement under the JVA including but not limited to Clause 5 of the JVA to CT in consideration of the sum of Ringgit Malaysia Twenty Three Million and Five Hundred Thousand (RM23,500,000.00) only ('the Consideration').

[62] The mode of payment is set out in cl. 3 of the second supplementary agreement. It reads as follows:

D 3. MODE OF PAYMENT

In lieu of and or in substitution of and or in discharge of Clause 5 of the JVA, the parties hereto hereby agree that SAP shall be entitled to receive from CT the Consideration in the amounts and manner following:

- E (i) the Advance being the sum of Ringgit Malaysia Eight Million and Nine Hundred and Ninety Seven Thousand and Three Hundred (RM8,997,300.00) only, already paid by CT and had and received by SAP, and
- F (ii) the sum of Ringgit Malaysia Two Million (RM2,000,000) only now paid by CT to SAP, the receipt of which SAP hereby acknowledges, and
- G (iii) the sum of Ringgit Malaysia Two Million (RM2,000,000) only within three (3) months from the date of this Agreement, and
- (iv) the sum of Ringgit Malaysia Two Hundred and Sixty Six Thousand and One Hundred (RM266,100) only within six (6) months from the date of this Agreement.

H [63] The release from obligations of Cergas Tegas under the second supplementary agreement is set out in cl. 5 and it is worded as follows:

I 5. RELEASE FROM OBLIGATIONS

Upon execution of this Agreement by the parties hereto, CT shall be relieved of the following obligations and covenants:

- (a) the obligation to develop and remain therein the said Land until completion pursuant to Clauses 2.01 and 2.02.4 of the JVA, and **A**
- (b) the obligation to complete the Development without unreasonable delay pursuant to Clause 2.02.6 of the JVA, and **B**
- (c) the obligation to prepare and submit reports pursuant to Clause 2.02.13 of the JVA, and
- (d) the obligation not to appoint any other company to be a developer of the said Land pursuant to Clause 2.02.19 of the JVA, and **C**
- (e) the obligation to let SAP or its agents to inspect the books and documents pursuant to Clause 5.07 of the JVA, and **D**
- (f) the obligation to prepare the final account pursuant to Clause 5.08 of the JVA, and
- (g) the obligation to complete the Development pursuant to Clause 10 of the JVA. **E**

[64] Clause 8 of the second supplementary agreement makes reference to the PA. It is worded in this manner:

8. The PA

Nothing herein this Agreement shall affect the PA which remains in full force and effect in favour of CT. **F**

[65] As to the rights and powers of SAP under the second supplementary agreement, it is reflected at cl. 9. It reads as follows: **G**

9. RIGHTS AND POWERS OF SAP

In the event that CT shall fail to pay to SAP the monies herein Clause 3 covenanted to be paid, SAP shall be entitled to claim interest at the rate of twelve per cent (12%) per annum on such sums remaining unpaid until realisation. **H**

[66] The inconsistencies are spelt out in cl. 13 of the second supplementary agreement and it is drafted in this manner:

I

A 13. INCONSISTENCIES

SAP recognises that it is receiving its entitlement earlier than contemplated under the JVA and hereby agrees that in the event of inconsistencies arising between the JVA, SA and this Agreement, such inconsistencies shall be resolved and or construed in favour of CT.

B

[67] All these clauses in the second supplementary agreement as alluded to above convey the meaning of the parties. In the realm of interpretation, Lord Steyn aptly said in *Equitable Life Assurance Society v. Hyman* [2000] 3 All ER 961 at 969:

C

The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.

D

[68] Thus, what Lord Hoffmann said in *Investors Compensation Scheme Ltd v. West Bromwich Building Society; Investors Compensation Scheme Ltd v. Hopkin & sons (A Firm) And Others* [1998] 1 WLR 896, 912 is perhaps the best guide to interpretation. His Lordship succinctly said:

E

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

F

[69] Indeed it was the intention of the parties here that by virtue of cl. 5 of the second supplementary agreement, Cergas Tegas was relieved of its obligation under the JVA.

G

[70] However, by letter dated 20 August 2002 SAP through its solicitors terminated the JVA and the notice of termination can be seen at pp. 818 to 820 of the appeal record C-2. Of relevance would be the paragraph at p. 819 of the appeal record C-2 which reads as follows:

H

By the Joint Venture Agreement dated 12.01.1991, the Supplementary Agreement dated 13.07.1992 and the Supplementary Agreement dated 26.06.1997 entered with our clients, you had covenanted and undertaken to develop the Joint Venture Land in accordance with the approved plans and subject to the terms and conditions therein contained (hereinafter collectively referred to as 'the Joint Venture Agreement').

I

[71] Two other paragraphs in the notice of termination at p. 820 of the appeal record C-2 relayed this message: A

By reason of the aforesaid, we are instructed by our clients to notify you, which we hereby do, that the Joint Venture Agreement is hereby terminated and accordingly, all rights granted to you under the Joint Venture Agreement and the Ancillary Agreements are hereby revoked. For the avoidance of doubt, your right to enter upon and/or occupy the Joint Venture Land is hereby also revoked. B

TAKE NOTICE that you are to deliver vacant possession of the Joint Venture Land to our clients within seven (7) days from the date of this letter failing which we have our clients' instructions to take all such action as may be necessary to enforce their rights in this regard without further reference to you. C

[72] The learned JC summarised the reasons for the termination of the JVA based on the notice of termination in his grounds of judgment in this way: D

- (a) that Cergas Tegas had failed to carry out the development of the said land in accordance with the approved plans under the JVA; E
- (b) that Cergas Tegas had failed to make payment to SAP of the agreed profits pursuant to the JVA;
- (c) that Cergas Tegas had failed to pay all the quit rents imposed by the relevant authorities pertaining to the said land under the JVA; and F
- (d) that Cergas Tegas had failed to fulfil its obligation under the credit facility granted by AmFinance (M) Berhad and such failure resulted in the foreclosure proceedings taken against the said land. G

[73] SAP still relied on the JVA and emphasised the material obligations of Cergas Tegas under the JVA, *inter alia*, as follows: H

- (a) to complete the development of the said land within six years;
- (b) to pay all quit rents and rates imposed by the relevant authorities from the date of the JVA;
- (c) to promptly pay the agreed profits to SAP; I

- A (d) in the event the said land is charged to the bank for bridging loan, Cergas Tegas covenants and undertakes to comply religiously to the terms of the loan without default and shall punctually pay and settle all instalment payments of the loan and other charges imposed by the bank and shall do the
B needful to discharge the charge and to keep SAP indemnified; and

(e) that Cergas Tegas shall only enter the said land for the purpose of development.

- C [74] With respect, a perusal of the notice of termination would categorically show that the solicitors for SAP had misconstrued the contractual relationship that existed between Cergas Tegas and SAP. All along SAP continued to treat Cergas Tegas as a joint venture partner under the JVA.
D

[75] The second paragraph of the notice of termination at p. 819 of the appeal record C-2 was worded in this manner:

- E We are informed by our clients that to date, you have (1) failed to carry out the development on the Joint Venture Land in accordance with the approved plans, (2) failed to make payment to our clients of the agreed profits and (3) failed to pay all quit rent dues imposed by the relevant authorities in relation to the Joint Venture Land in accordance with your obligations under the Joint Venture Agreement. We are further informed by our clients
F that you have breached your obligations under the Loan thereby resulting in events of default under the Charge. Despite notice being given by our clients to you to remedy such breach under the Loan *vide* their letter dated 1.07.2002, you have to date failed, neglected and/or refused to do so.

- G [76] And it gave the impression that SAP considered the JVA, the first supplementary agreement and the second supplementary agreement as one single contract to develop the said land. It overlooked cl. 5 of the second supplementary agreement which relieved Cergas Tegas of its obligation under the JVA.
H overlooked cl. 2 of the second supplementary agreement which stated the consideration in the sum of RM23,500,000 for SAP “to dispose of its entire interest rights benefits and entitlement under the JVA including but not limited to cl. 5 of the JVA” to Cergas Tegas. In our judgment, it is plain that the second supplementary
I

agreement is an agreement *simpliciter* to purchase the said land and not to develop the said land as a joint venture. This is the true and correct interpretation of the second supplementary agreement. A

[77] The second supplementary agreement reflected the intention of the contracting parties. According to Lord Diplock in *Pioneer Shipping Ltd And Others v. BTP Tioxide Ltd* [1982] AC 724: B

The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them ... C

[78] It is an objective exercise in interpreting a contract. According to Lord Steyn in *Sirius International Insurance Co (Publ) v. FAI General Insurance Ltd* [2004] 1 WLR 3251: D

The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene. E

[79] Now, applying an objective exercise, the second supplementary agreement superseded the JVA and the first supplementary agreement. And contemporaneous with that, there was also an option to purchase dated 26 June 1997 which granted Cergas Tegas the option to acquire the said land. It must be borne in mind that the consideration for the purchase of the said land under the option was RM23,500,000 and it is the same amount as the consideration under the second supplementary agreement. And pursuant to cl. 3 of the option to purchase, it was agreed that all monies paid under the agreements to SAP would be deducted. F G

[80] The stand of Cergas Tegas is that all the agreements must be read together in order to conclude what was the ultimate intention of the parties. This is the correct approach to adopt and it received the sanction of this court in *Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 where Gopal Sri Ram JCA (later FCJ) said at pp. 423 to 424: H I

A It is a settled guiding principle that where in a transaction more than one document or instrument is involved, courts usually construe those documents together. The point was made by *Raja Azlan J* in *Mohamed Isa & Ors v. Abdul Karim & Ors* [1970] 2 MLJ 165 in a language that cannot be rivalled. This is what Raja Azlan J (as His Royal Highness then was) said:

B It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one. This principle was followed in *Idris bin Haji Mohamed v. Ng Ah Siew*, *supra*, where Terrell J at page 261 said:

C It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is a corollary from this that the intention must be gathered from the documents as a whole. It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards v. Marcus* [1894] 1 QB 587 (see also the dissenting judgment of Fletcher Moulton LJ in *Manks v. Whiteley*, which was approved on appeal to the House of Lords, sub-nominee *Whiteley v. Delaney* [1914] AC 132).

D In the present case, the two said permits to mine referred to the same subject matter and were substantially in identical terms except that the second permit was to take effect only a year later, that is, after the first permit had expired. In the circumstances, the two permits to mine should be read together as forming one permit to mine for a period of two years.

E (8) This passage was recently applied by this court in *Mars Equity Sdn. Bhd. v. Tis 'Ata' Ashar Sdn Bhd* [2005] 1 CLJ 513.

F (9) So it follows that all the documents we have just mentioned must be read together. It is the combined effect of these documents that we are concerned with in order to ascertain the intention of the parties in this case. We are therefore of the view that there is merit in the plaintiff's complaint that the learned judge was wrong in the approach he took by focusing solely upon the Purchase Undertaking.

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[81] Cergas Tegas had by way of a letter dated 9 December 2003 addressed to SAP exercised the option to purchase and offered to pay the balance of the purchase price then due for the sum of RM9,386,074.51 which was to be paid in one payment. The letter dated 9 December 2003 from Cergas Tegas to the Chairman of SAP was labelled as “Strictly Without Prejudice” and it can be seen at p. 866 of the appeal record C-2 and it was worded as follows:

Re: Joint venture for the development of the land held under Title No. H.S.(D) 20034, P.T. No. 26549, Mukim of Batu, District of Gombak, State of Selangor (‘the said Land’)

We refer to the above matter.

Strictly on a without prejudice basis:

- (1) We hereby give you notice to exercise the option under the Option Agreement dated 26.6.1997 to purchase the said Land;
- (2) You shall agree to give effect and to comply with all your obligations under the Supplementary Agreement and Option Agreement both dated 26.6.1997 including but not limited to executing a fresh Irrevocable power of Attorney in our favour; and
- (3) The sum of RM9,386,074.51 is to be paid in one payment as full and final settlement of the amount due to you under the Supplementary Agreement dated 26.6.1997.

In the interim we put on record that this letter shall not be construed as any admission by us or as any waiver of our rights in the above matter.

[82] Interestingly, under the column “Mode of Payment” in the second supplementary agreement at p. 531 of the appeal record C-1, the balance of the purchase price due under the second supplementary agreement was listed at RM10,236,600.

[83] In our judgment, upon reading the agreements together, if Cergas Tegas is entitled to specific performance of the agreements then Cergas Tegas too is entitled to the conveyance of the said land subject to Cergas Tegas paying the balance of the purchase price together with the interest accrued on or at the date of the wrongful termination.

- A** [84] By letter dated 6 September 2002, Cergas Tegas disputed the termination of the JVA and reiterated the effect of the second supplementary agreement. The letter dated 6 September 2002 can be seen at pp. 821 to 822 of the appeal record C-2:
- B** We refute absolutely the basis upon which your client is attempting to terminate the Joint Venture Agreement ('JVA').
- The terms of the JVA have been amended and supplemented by a Supplementary Agreement dated 26/6/1997 (the 'Supplementary Agreement') pursuant to which your client has agreed to dispose
- C** its entire rights, benefits and entitlement under the JVA (including but not limited to its entitlement to receive profits) to us.
- It was also expressly agreed by the parties to the Supplementary Agreement that we would be relieved of various obligations under the JVA, in particular the obligation to complete the Development.
- D** It was further agreed that the rights and powers of your client on defaults under the JVA and the provisions relating to termination under the JVA have been rendered redundant and have ceased to be of any effect or force whatsoever.
- E** In this regard, the basis on which your client is (i) terminating the JVA, (ii) revoking all rights granted to us under the JVA and the Ancillary Agreements (as defined in your letter) and (iii) demanding delivery of vacant possession of the Joint Venture Land, is without grounds whatsoever.
- F** In this respect, we reserve all our rights under the JVA and the Ancillary Agreements, including but not limited to taking legal proceedings against your client to enforce and protect our rights thereunder.
- G** [85] On 3 September 2002, SAP revoked the irrevocable PA. It is trite that the irrevocable PA cannot be revoked unilaterally. Section 6 of the Powers of Attorney Act 1949 (Act 424) enacts as follows:
- H** 6. Powers of attorney given for valuable consideration.
- (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser -
- I** (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and

(b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

A

B

(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.

C

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

D

[86] In para. (15) of the PA at p. 513 of the appeal record C-1, in granting the PA, SAP declared it to be irrevocable and that it was given for valuable consideration which was received by SAP.

[87] Notwithstanding the notice of termination of the JVA which was on 20 August 2002, Cergas Tegas wrote another letter dated 5 June 2003 to SAP and reminded SAP of the condition precedent in cl. 3(v) of the second supplementary agreement which stated that Cergas Tegas shall receive from SAP a written waiver from the appropriate authorities confirming the waiver of the payment of the land premium. In this connection, the appropriate authorities would be the Pejabat Daerah dan Tanah Gombak. The letter dated 5 June 2003 can be seen at pp. 841 to 842 of the appeal record C-2 and it was worded in this way:

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We refer to the Joint Venture Agreement dated 12.01.1991 (the 'Joint Venture Agreement'), which was subsequently varied by the Supplementary Agreement dated 26.06.1997 entered into between SAP Holdings Berhad ('SAP') ourselves in respect of the Joint Venture Land.

H

Clause 3(v) of the Supplementary Agreement provides that payment of the final instalment of the consideration payable to SAP is conditional upon land premium in respect of the Joint Venture Land having been waived unconditionally.

I

- A** SAP has given us a letter dated 2nd February, 1994 from the Pejabat Daerah dan Tanah Gombak, which appears to be an approval of a conditional waiver of premium, in consideration of a mosque being built. (A copy of the letter is enclosed for your ease of reference). Although you have given us a copy of a certificate of payment in respect of the construction of the mosque, this
- B** certificate was issued by Jurukur Bahan of JKR Gombak and not by the Pejabat Daerah dan Tanah Gombak. We believe that SAP has yet to comply with its obligations under the Supplementary Agreement in that SAP has yet to provide us a letter from the Pejabat Daerah dan Tanah Gombak granting unconditional waiver of the payment of land premium.
- C**

In this regard, we believe that the payment of the balance consideration under the Supplementary Agreement is not yet due. Accordingly, the interest which has been calculated on the outstanding balance is erroneous and is not due nor payable.

- D** [88] It must be borne in mind that the balance consideration of RM10,236,600 is only payable upon receipt of the said written waiver.

- E** [89] Now, in the same letter dated 5 June 2003 as reproduced, Cergas Tegas reminded SAP that the balance of the consideration was not due yet because SAP had yet to provide a letter from the Pejabat Daerah dan Tanah Gombak – this is the appropriate authority referred to in the second supplementary agreement.

- F** [90] It can be surmised that by this letter dated 5 June 2003, Cergas Tegas had evinced its intention to complete the purchase of the said land pursuant to the second supplementary agreement.

- G** [91] Not to be outwitted, SAP by letter through its solicitors dated 25 June 2003 responded. In that response, SAP maintained its stand as reflected in its notice of termination of the JVA dated 20 August 2002. SAP also claimed that the condition in cl. 3(v)(a) of the second supplementary agreement was fulfilled when SAP stated that (see the letter at p. 853 of the appeal record C-2):

- H** (a) the relevant land premium for the Subject Land has been exempted/waived with the construction and completion of the Mosque at Phase 1F Bandar Baru Selayang by our clients;
- I** (b) the relevant approvals in accordance with the letter dated 2.02.1994 from the Gombak Land and District Office have been obtained; and
- (c) the matters set out in (a) and (b) above are undisputed facts within your knowledge.

[92] Cergas Tegas also responded to SAP's solicitors letter by its letter dated 27 June 2003. By this letter, Cergas Tegas maintained that the matters asserted by SAP in SAP's letter dated 25 June 2003 did not meet cl. 3(v)(a) of the second supplementary agreement. By this letter too (see pp. 854 to 855 of the appeal record C-2), Cergas Tegas insisted that a written confirmation from the Pejabat Daerah dan Tanah Gombak confirming the fulfilment of the condition, now that the mosque has been built, be sent to Cergas Tegas.

[93] Finally, SAP's solicitors by letter dated 18 July 2003 as seen at p. 861 of the appeal record C-2 forwarded a letter from the appropriate authority – that would be the letter from the Pejabat Daerah dan Tanah Gombak dated 8 July 2003 as seen at p. 860 of the appeal record C-2, confirming the waiver of the said land premium since the mosque has been built on the site.

[94] For convenience, the letter from SAP's solicitors dated 18 July 2003 as seen at p. 861 of the appeal record C-2 is now reproduced:

Enclosed is a copy of the letter dated 8.07.2003 from the Gombak District and Land Office re-confirming that the State Authority had approved the exemption/waiver from payment of the relevant land premium for the Subject Land on 1.12.1993.

This waiver was initially conveyed to our client by the letter dated 2.02.1994 from the Gombak District and Land Office, a copy of which had been extended to you earlier.

[95] And for convenience, the letter of waiver from the Pejabat Daerah dan Tanah Gombak dated 8 July 2003 as seen at p. 860 of the appeal record C-2 is also reproduced:

2. Sukacita pejabat ini mengesahkan pihak tuan telah dikecualikan bayaran premium tanah bagi kawasan pembangunan Fasa 1C (Blok Title) No. HSD. 20034 PT. 26549 Bandar Baru Selayang mulai 1hb Disember, 1993 iaitu tarikh kelulusan Majlis Mesyuarat Kerajaan Negeri yang bersidang pada tarikh tersebut. Pengecualian ini adalah sebagai kontra kepada pembinaan Masjid di Fasa 1F (Masjid Firdaus) seperti di Lampiran A. Pembangunan yang telahpun disiapkan dan diserahkan kepada Jabatan Kerja Raya dan Pejabat Daerah Gombak.

[96] On 9 December 2003, Cergas Tegas wrote to SAP and exercised the option to purchase as well as stating its intention to pursue its rights under the second supplementary agreement. This letter dated 9 December 2003 has been reproduced earlier.

A [97] From all these correspondences, Cergas Tegas was certainly ready, willing and able to undertake its obligations under the various agreements including the second supplementary agreement. SAP, on the other hand, continued to maintain its stand that all the agreements had been terminated on 20 August 2002. This is reflected in the statement of claim of Cergas Tegas at p. 41 of the appeal record at Jilid “A” particularly at paras. 15.7 and 16 which will now be reproduced:

C 15.7 By a letter dated 9.12.2003, the Plaintiff had given notice to exercise the option under the Option Agreement dated 26.6.1997 to purchase the said land and to pay to the Defendant the sum of RM9,386,074.51 being the amount due under the 2nd Supplementary Agreement. Yet further, the Defendant has continued to maintain its stand that the said Agreements have been terminated and refuse to accept the said payment.

D 16. The Plaintiff is at all times ready, willing and able to undertake all their obligations under the JV Agreement read with the 2nd Supplementary Agreement and shall continue to do so.

E [98] That would be the background to the 185 suit.

F [99] Despite SAP’s continued obligation under the second supplementary agreement to Cergas Tegas, SAP purported to encumber the said land to Star Everest. This prompted Cergas Tegas to file the 280 suit.

G [100] In both these two civil suits - the 185 suit and the 280 suit, SAP by consent allowed an interim injunction to be granted thereby preserving the *status quo* of the said land.

[101] The parties agreed that there were only two issues to be tried in the 185 suit, namely:

H (i) Whether Cergas Tegas had breached the terms of the JVA read together with the first supplementary agreement, the second supplementary agreement and the PA with the option to purchase and whether SAP had lawfully terminated these agreements; and

I (ii) Whether SAP is estopped by conduct from terminating these agreements.

[102] Cergas Tegas contended that they were not in breach of the agreements and that the second supplementary agreement was still binding until the condition in cl. 3(v)(a) of the second supplementary agreement is fulfilled by SAP. **A**

[103] SAP, on the other hand, contended that the condition in cl. 3(v)(a) of the second supplementary agreement had been fulfilled. **B**

[104] At this juncture, it is germane to refer to cl. 3(v) of the second supplementary agreement and it is worded as follows (see p. 531 of the appeal record C-1): **C**

(v) subject to and upon receipt by CT from SAP of

(a) the written waiver from the Appropriate Authorities confirming the waiver of payment of the Alienation/Land Premium, or

(b) documentary evidence of payment of the Alienation/Land Premium, **D**

the sum of Ringgit Malaysia Ten Million Two Hundred And Thirty Six Thousand and Six Hundred (RM10,236,600.00) only within nine (9) months from the date of this Agreement. **E**

[105] SAP argued that they had furnished the waiver and referred to a letter from the Pejabat Daerah dan Tanah Gombak dated 2 February 1994 as being the waiver and this very letter can be seen at p. 601 of the appeal record C-2 and the relevant part reads as follows: **F**

(i) Diberikan pengecualian bayaran premium tanah bagi kawasan pembangunan Fasa 1C, Bandar Baru Selayang sebagai balasan-balasan kepada pembinaan Masjid di Pembangunan Fasa 1F. **G**

[106] By letter dated 30 April 1998 which SAP wrote to Cergas Tegas as seen at pp. 716 to 717 of the appeal record C-2, SAP contended that the letter from the Pejabat Daerah dan Tanah Gombak dated 2 February 1994 as reproduced above and the quantity surveyor's certification of final payment in respect of the mosque was sufficient fulfilment of cl. 3(v)(a) of the second supplementary agreement. **H**

[107] But Cergas Tegas contended that the waiver based on the Pejabat Daerah dan Tanah Gombak's letter dated 2 February 1994 as reproduced above was a waiver with a condition, that is, **I**

- A** subject to the building of a mosque and therefore according to Cergas Tegas until and unless there was a letter in clear terms from the appropriate authority confirming that the conditional waiver of the premium was fulfilled, the condition precedent in cl. 3(v)(a) of the second supplementary agreement remained
- B** unfulfilled.

- [108]** In our judgment, Cergas Tegas contention must be correct because eventually SAP produced that written confirmation in clear terms from the Pejabat Daerah dan Tanah Gombak dated 8 July 2003 as reproduced earlier.
- C**

[109] However, SAP contended that the letter from the Pejabat Daerah dan Tanah Gombak dated 8 July 2003 was to re-confirm the waiver.

- D** **[110]** And the learned JC agreed with SAP's contention when His Lordship said (see pp. 56 to 57 of the additional appeal record):

- E** (25) The Defendant states that the reason why the Plaintiff never raised this defence before is because that condition precedent had been fulfilled long ago. In fact by the Defendant's letter dated 30.4.1998 the Defendant had informed the Plaintiff that the land premium of RM10 million had been waived by the state authority following the construction of the mosque as required by the authorities. The Payment Certificate issued by JKR's Quantity
- F** Surveyor dated 3.11.1997 confirming payment for the mosque was also forwarded to the Plaintiff. The position taken by the Plaintiff that it came to know of the waiver only by the Gombak Land Office letter of 8.7.2003 is contrary to the Plaintiff's conduct from 1997 and in particular making proposals for rescheduling of payments and making part payments thereof.
- G**

- H** (26) In any event, I find that (the) letter of 8.7.2003 from the Gombak Land Office is reconfirmation of the fact of the waiver of the land premium approved much earlier by the state authority and not a fresh confirmation as alleged. Defendant's solicitors' letter dated 25.6.2003 refuted the Plaintiff's allegation in this regard and reiterated the fact (that) the Gombak Land Office had confirmed the waiver of the land premium as far back as 2.2.1994 and the same is well within the knowledge of the Plaintiff. Therefore, I am unable to accept that contention.

- I**

[111] We agree with the submission that the learned JC is plainly wrong in treating the letter from the Pejabat Daerah dan Tanah Gombak dated 8 July 2003 as a reconfirmation of the waiver and that the waiver in the letter dated 2 February 1994 constituted a compliance of the condition precedent of cl. 3(v)(a) of the second supplementary agreement. It is our judgment that the learned JC erred when he misconstrued the documentary evidence.

[112] And neither can the payment certificate issued by the JKR's quantity surveyor be construed as a written confirmation or fulfilment of the condition attached to the waiver.

[113] We note that the learned JC recognised the effect of cl. 3(v)(a) of the second supplementary agreement when His Lordship said at p. 55 of the additional appeal record:

Now, that condition precedent alluded to by the Defendant is the receipt of a written waiver from the Appropriate Authority confirming the waiver of payment of the land premium for the said Land.

[114] Despite that understanding, His Lordship ventured to find that the confirmation by SAP in the letter dated 30 April 1998 as being in compliance with cl. 3(v)(a) of the second supplementary agreement. A perusal of the letter dated 30 April 1998 as seen at pp. 716 to 717 of the appeal record C-2 shows that it is not a written confirmation from the appropriate authority, namely, Pejabat Daerah dan Tanah Gombak. If the learned JC was correct in finding that the conditional waiver found in the Pejabat Daerah dan Tanah Gombak's letter dated 2 February 1994 (which spoke about a waiver with a condition, that is, subject to the building of a mosque) and the certificate of the JKR quantity surveyor approving the final payment of a mosque was sufficient compliance of cl. 3(v)(a) of the second supplementary agreement, it would appear that the learned JC was effectively rewriting cl. 3(v)(a) of the second supplementary agreement. It is here that the learned JC fell into an error. In our judgment, the learned JC ought not to rewrite the contract for the parties.

[115] In *Shell Malaysia Trading Sdn Bhd v. Lim Yee Teck & Ors* [1982] 1 LNS 11; [1982] 2 MLJ 181, Lee Hun Hoe CJ (Borneo) speaking for the Federal Court had this to say about rewriting contract at p. 183 (MLJ) of the report:

A With respect, the learned Judge was clearly wrong as he was in effect rewriting the contract for the parties by imposing a term which could not be imported into the contract.

B [116] Lord Templeman delivering the judgment of the Privy Council in *Lim Yee Teck & Ors v. Shell (M) Trading Sdn Bhd* [1986] 2 CLJ 104; [1986] CLJ (Rep) 13; [1985] 2 MLJ 265, at p. 267 had this to say:

C But there is nothing in the agreement dated December 29, 1972 which obliged Shell to do more than make the necessary application for sub-division. Their Lordships decline to imply in the agreement or to impose an obligation on the part of Shell to bring proceedings. Such an obligation whether express or implied would be thoroughly unreasonable.

D [117] Lai Kew Chai J in *Yeo Brothers Co (Pte) Ltd v. Atlas Properties (Pte) Ltd* [1987] 1 LNS 89; [1988] 1 MLJ 150 at p. 155 said:

E This court has no power to rewrite contracts between the parties and must leave them to act according to their best interest and legal advice.

F [118] It cannot be denied that cl. 3(v)(a) of the second supplementary agreement is a condition subsequent for further performance. It remains a binding agreement until the event in cl. 3(v)(a) of the second supplementary agreement is fulfilled.

G [119] Right from the start, contracting parties will agree that if a certain circumstance occur, then the contract will come to an end. A classic example is a manufacturers' guarantee offering to give a refund if a fault in the goods appears within a specified time.

H [120] Put in another way, a condition subsequent is a condition upon the fulfilment of which an existing contract is extinguished. In *Head v. Tattersall* [1871] LR 7 & Ex 7, a horse was sold on the basis that it had been hunted with the Bicester hounds. It was expressly stated by the seller that if it had not been so hunted the buyer could return it by 5pm on the following Wednesday. Before that time arrived, the horse was injured and the buyer discovered that it had not been hunted with the Bicester hounds. And the buyer had not been at fault with regard to the injury to the horse. The court held that the buyer could return the horse, despite its injury, because it had not been hunted with the Bicester hounds.

I

[121] The learned JC also found that Cergas Tegas could not insist on the fulfilment of the condition precedent of cl. 3(v)(a) of the second supplementary agreement by virtue of the stand taken by Cergas Tegas in an earlier suit filed in the High Court of Shah Alam *vide* Suit No: 22-844-2001 (hereinafter referred to as the “Shah Alam Suit”).

[122] It is quite apparent that the learned JC relied on part of the defence in the Shah Alam Suit where Cergas Tegas had adopted an alternative plea that SAP and Cergas Tegas had an understanding that the parties had set aside their respective rights under the second supplementary agreement. The learned JC must have referred to para. 12 of the statement of defence of Cergas Tegas in the Shah Alam Suit as seen at p. 812 of the appeal record C-2 which was worded as follows:

12. Selanjutnya dan/atau secara alternatif, pihak Defendan (referring to Cergas Tegas) menegaskan bahawa pada setiap masa material, terdapat persefahaman antara Plaintiff (referring to SAP) dan Defendan (referring to Cergas Tegas) untuk mengenyepikan hak-hak mereka di bawah Perjanjian Tambahan tersebut dan justeru itu, Plaintiff (referring to SAP) diestopkan daripada melaksanakan haknya di bawah Perjanjian Tambahan tersebut.

[123] And the learned JC’s findings in regard to the Shah Alam Suit can be seen in the second part of para. 28 and the complete para. 29 of the learned JC’s judgment at pp. 59 to 60 of the additional appeal record which we will now reproduce:

Now, the plaintiff has failed to settle the consideration stipulated in the 2nd Supplementary Agreement and is clearly in breach of its terms. The plaintiff has failed to perform its obligations under the 2nd Supplementary Agreement and as such it cannot seek to derive benefit from that Agreement. Further, the plaintiff has in the Shah Alam Suit taken a position in the pleadings that the parties were no longer bound by the terms of the 2nd Supplementary Agreement, that would mean that the JVA prevails. However, in this suit the plaintiff has taken a contrary position to say that the 2nd Supplementary Agreement is valid and supersedes the JVA.

(29) The plaintiff argues that the averment in the pleadings cannot operate as estoppel for it was not made under oath nor has it been determined by the Court. However, it must be pointed out that the defendant in reliance of that stand taken by the plaintiff had discontinued that action. The defendant has placed reliance on

A that averment in the pleadings and acted to its detriment by
discontinuing that suit. The doctrine of estoppel is not confined
to statements made under oath or to matters which have been
judicially determined. It can arise from positions taken from the
pleadings of parties in related proceedings involving the same
subject matter, as is the case here. Though pleadings may be
B amended or abandoned, the plaintiff did neither. The averment in
its defence in the Shah Alam Suit remained unaltered until the
discontinuance. Therefore, the plaintiff would be estopped from
now relying on the terms of the 2nd Supplementary Agreement
to argue that the JVA has been superseded. The plaintiff cannot
C appraise and reprobate.

[124] With respect, the learned JC failed to consider that Cergas
Tegas had taken various alternate pleas in their defence in the
Shah Alam Suit. One of the alternate defences was that SAP's
claim in the Shah Alam Suit was premature because SAP had yet
D to fulfil its obligation in regard to cl. 3(v)(a) of the second
supplementary agreement. Towards this end, the statement of
defence of Cergas Tegas in the Shah Alam Suit should be referred
to, particularly para. 8 which was worded as follows (see p. 811
E of the appeal record C-2):

8. Selanjutnya dan/atau secara alternatif, defendan menegaskan
bahawa tindakan plaintiff tersebut adalah pra-matang oleh
kerana plaintiff masih belum memenuhi obligasinya di bawah
Perjanjian Tambahan tersebut khususnya klausa 3(v).

F [125] Consequently, the learned JC found that Cergas Tegas was
estopped from asserting its rights under the second supplementary
agreement by virtue of Cergas Tegas's stand taken in the Shah
Alam Suit.

G [126] With respect, the learned JC was wrong in making such a
finding. It must be emphasised that the issue of estoppel was
never part of SAP's pleaded case in either the 185 suit or the 280
suit. Even though reference was made to the Shah Alam Suit in
the pleadings, yet the facts and issues pertaining to issue estoppel
H was never pleaded.

[127] It must be borne in mind that SAP introduced the issue of
estoppel for the very first time in SAP's first witness statement
particularly in the Q & A 41 and the additional Q & A 57. SAP's
I first witness would be Jeffrey Foo Kwang Pheng (DW1) and his
additional Q & A 41 can be seen at pp. 376 to 377 of the appeal
record at Jilid 1, Bahagian "B" and it was worded in this way:

41. Q: Why was this Suit for the claim for outstanding sum of RM14,322,173.06 withdrawn? **A**
- A: In their defence filed into Court to this Suit, the plaintiff (Cergas Tegas Sdn Bhd) took the position and stand in paragraph 12 that both SAP and Cergas Tegas Sdn Bhd have an understanding to set aside and not to be bound by their respective rights under the second supplementary agreement dated 26.06.1997 and that SAP is estopped from exercising its rights under the second supplementary agreement dated 26.06.1997. **B**
- Since Cergas Tegas Sdn Bhd chose to take this position and make public declaration of the same by virtue of (the) Statement of Defence filed in Court, we have no qualms to accept Cergas Tegas's statement, position and conduct to that effect and we chose to revert back to the Original Joint Venture Agreement dated 12.01.1991 and we demand our rights and exercise our rights under the Original Joint Venture Agreement dated 12.01.1991 and we issued the termination letter for fundamental breach of the original Original Joint Venture Agreement dated 12.01.1997. **C**
- [128]** And Jeffrey Foo Kwang Pheng (DW1's) additional Q & A 57 can be seen at p. 384 of the appeal record at Jilid 1, Bahagian "B" and it was worded in this way: **D**
57. (Pg 211 Bundle C, Pembelaan filed by plaintiff)
- Q : Para 12 Defence, plaintiff estopped from its rights, both parties not bound by Supplementary Agreement? **E**
- A : Yes. **F**
- [129]** In our judgment, the learned JC ought not to have made such findings based on evidence adduced in respect of the issue of estoppel that was not pleaded. The court have, time and again, stressed the importance of pleadings and have categorically applied the singular principle that the trial of a suit and the findings thereto should be confined to the pleadings. **G**
- [130]** Pleadings must contain particulars in order to ensure that the parties are informed with reasonable certainty as to the matters which are alleged against them (*Batcha Ammal v. Ponnachi* [1965] 1 LNS 11; [1965] 2 MLJ 43). It is also prudent to remember that no party should be taken by surprise (*Lim Kee Tiak* **H**
- I**

- A *v. Lim Kee Tian* [1986] 1 LNS 15; [1987] 2 MLJ 528) and it is for this reason that the particulars must be advanced in order to limit and define the issues at the trial (*Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615). Sharma J in *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196 explained it better in these words:

- C In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to
- D ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

- [131] Raja Azlan Shah FJ (as His Majesty then was) in *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157 aptly said at p. 159:

- E Now the function of pleadings is to give fair notice of the case which is to be made so that the opposing party may direct his evidence to the issue disclosed by them. See *Esso Petroleum Co Ltd v. Southport Corporation* [1956] AC 218, 238.

- F [132] Continuing on the same page, His Majesty had this to say:

Since the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and a new trial ordered.

- G [133] Gunn Chit Tuan SCJ in *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152, SC applied *Janagi v. Ong Boon Kiat* (*supra*) and held that as the trial court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal must be allowed and
- H the order of the High Court Judge in dismissing the plaintiff's claim was set aside.

- [134] Gopal Sri Ram JCA (later FCJ) in *Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Another Cases*
- I [2008] 1 LNS 669; [2009] 2 MLJ 685, writing a separate judgment held that since the court below appeared to have

completely disregarded the respondent's pleaded case and proceeded to find for him on the unpleaded case, that constituted a serious misdirection and it was manifestly unjust. A

[135] In regard to the payments that were due under cl. 3(i) to (iv) of the second supplementary agreement, Cergas Tegas witness confirmed that all payments due have been paid. And what was left to be paid was the balance consideration which was only due after the fulfilment of the condition precedent. B

[136] In our judgment, it was SAP's fault in not procuring the written confirmation from the Pejabat Daerah dan Tanah Gombak of the written waiver confirming the waiver of the payment of the land premium. It was within SAP's control to obtain that written confirmation which finally came in the form of the letter dated 8 July 2003. SAP should not be permitted to take advantage of the state of things which SAP themselves had produced. In this context, reference should be made to the case of *Poon Guan Sdn Bhd v. Sem Siong Industries Sdn Bhd* [1983] 2 CLJ 208; [1983] CLJ (Rep) 326; [1983] 2 MLJ 317 where Hashim Yeop A Sani FJ at p. 320 quoted what Lord Finlay LC said in the case of *New Zealand Shipping Company, Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1: C
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It is a principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced. F

[137] In regard to the second issue, we agree with the submission that SAP had waived any alleged breach in regard to late payments based on the correspondences subsequent to the termination. G

[138] To recapitulate. It is our judgment that the second supplementary agreement is the ultimate agreement and contemporaneous with that would be an option to purchase dated 26 June 1997 which gave Cergas Tegas the option to acquire the said land. H

[139] Again to recapitulate. It is also our judgment that the JVA and the first supplementary agreement had been superseded by the second supplementary agreement based on the following salient grounds: I

- A (a) that the terms of the second supplementary agreement as alluded to somewhere in this judgment and the validity of the same, are not in dispute;
- B (b) that recital 8 and cl. 2 of the second supplementary agreement expressly state that SAP agrees to dispose of its entire rights, benefits and entitlement under the JVA for the consideration sum of RM23,500,000;
- C (c) that it is expressly agreed that upon the execution of the second supplementary agreement, Cergas Tegas shall be relieved or released from, *inter alia*, the obligation to complete the development of the said land pursuant to the JVA;
- D (d) that it is also expressly agreed that, *inter alia*, Cergas Tegas shall be entitled to retain possession and custody of the issue document of title to the said land and to do all things and acts consistent with the legal and beneficial ownership of the said land;
- E (e) that in the event of any late payment of the consideration stated in the second supplementary agreement, interest at the rate of 12% per annum is chargeable by SAP;
- (f) that the right to terminate the JVA was expressly removed by cl. 11 of the second supplementary agreement; and
- F (g) that the last paragraph of cl. 21 of the second supplementary agreement expressly states that the second supplementary agreement supercedes all other agreements and correspondences (oral or written, expressed or implied).
- G [140] Cergas Tegas and SAP embarked on the second supplementary agreement. It was part performed and the particulars thereof may be stated in this way:
- H (a) that the sum of RM13,576,616.68 (see para. 11 of the statement of claim where the total sum of RM14,113,925.49 less the sum of RM537,308.81 for the sale of rocks) was paid pursuant to cl. 3 of the second supplementary agreement;
- I (b) that although there were some delays in the payment, SAP nevertheless accepted payment and, till to date, have retained payment and have not refunded the same;

- (c) that there is also an inconsistency between Cergas Tegas and SAP in regard to the amount paid, but this is insignificant because the fact that about half of the consideration was paid and received, is not in dispute; **A**
- (d) that rightly SAP had imposed interest on the late payments in accordance with cl. 9 of the second supplementary agreement; **B**
- (e) that SAP proceeded to obtain the waiver of the payment of the land premium for the alienation of the said land in accordance with cl. 3(v) of the second supplementary agreement; **C**
- (f) that there was no insistence by SAP on the performance of the JVA after the execution of the second supplementary agreement; and **D**
- (g) that Cergas Tegas offered to pay the balance sum of RM9,386,074.51 pursuant to the second supplementary agreement and to the purchase option agreement by letter dated 9 December 2003 but unfortunately this was rejected by SAP. **E**

[141] It is our judgment that:

- (a) the obligations, rights and interests under the JVA and the first supplementary agreement were superceded or replaced with the second supplementary agreement; **F**
- (b) SAP wrongfully terminated the second supplementary agreement on the basis of the breach of the JVA;
- (c) for all intents and purposes, Cergas Tegas became the beneficial owner of the said land pursuant to the second supplementary agreement; and **G**
- (d) SAP's remedy for the alleged non-payment of the balance sum under cl. 3 of the second supplementary agreement was to sue for the balance sum as a debt owing wherein interest of 12% per annum was also provided for in cl. 9 of the second supplementary agreement. **H**

[142] It is our judgment that there is no dispute or denial by SAP that part payment under cl. 3 of the second supplementary agreement had been made and received by SAP. And this is **I**

- A** expressly evident from the pleadings itself especially at paras. 9.4 and 12.2(3) of SAP's statement of defence and in the Shah Alam Suit wherein SAP claimed for the sum of RM14,322,173.06 as the balance due including interest under cl. 3 of the second supplementary agreement.
- B** [143] It must be borne in mind that the correspondences from SAP to Cergas Tegas between the period from the date of the second supplementary agreement until the termination letter of 20 August 2002, never harped on the alleged obligations under
- C** the JVA but only referred to the issue of payment under cl. 3 of the second supplementary agreement. But the allegations of the non-performance of the JVA was brought up for the very first time in SAP's letter of termination through its solicitors.
- D** [144] Clause 18 of the JVA contains an arbitration clause. But the parties did not adhere to it at all. No referral to arbitration was ever made for any dispute and instead the parties resorted to court action immediately. This indirectly shows that the terms of the JVA were abandoned or superseded.
- E** [145] This is an appropriate case for this court to interfere with the findings of the learned JC. With respect, His Lordship erred in fact and in law when he:
- F** (a) failed to place sufficient weight on the fact that the parties had embarked on and part performed the second supplementary agreement and that the terms therein are not in dispute and have been elucidated and particularised in this judgment;
- G** (b) placed undue weight on the position taken by Cergas Tegas in the pleadings in the Shah Alam Suit which was struck out and was not heard on the merits;
- (c) failed to judicially consider the totality of the evidence which showed that the parties had abandoned their respective rights, duties and obligations under the JVA; and
- H** (d) failed to judicially consider the true motive of SAP in terminating the JVA and that would be for the purpose of disposing the said land to Star Everest as pleaded in the statement of claim in the 280 suit and the termination of the
- I** second supplementary agreement on the ground of breach of the JVA was an afterthought on the part of SAP.

[146] The central feature of appellate intervention has been lucidly laid down by Steve Shim CJ (Sabah & Sarawak) in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, FC. At p. 320 of the report, His Lordship writing for the Federal Court aptly said:

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeals' restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[147] In the same vein, Nik Hashim FCJ writing for the Federal Court in *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1 succinctly said at p. 18 of the report:

Non-consideration of material evidence constitutes 'insufficient judicial appreciation of relevant evidence' which phrase was lucidly explained by the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin* [2003] 2 CLJ 19 with which we agree. Thus, the failure of the Court of Appeal to have regard to the experts' evidence in arriving at its decision has indeed resulted in a serious and substantial miscarriage of justice which invites appellate interference.

[148] Abdul Malik bin Ishak JCA in *Arab Malaysian Finance Bhd v. Kah Motor Co Sdn Bhd & Another Case* [2010] 1 LNS 359; [2010] 5 MLJ 10, listed down an array of authorities on appellate intervention. At pp. 18 to 19, His Lordship had this to say:

(27) We will also demonstrate that there was an inadequate judicial appreciation of the evidence as adduced. Appellate intervention is called for in this appeal. The Privy Council speaking through Lord Fraser of Tullybelton in *Chow Yee Wah & Anor v. Choo Ah*

- A *Pat* [1978] 2 MLJ 41 (PC), at p 42, made reference to the case of *Clarke v. Edinburgh & District Tramways Co* [1919] SC 35 (HL) where the following principles of law were laid down:

- B When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court?
- C In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.
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- G The first part of that quotation from the speech of Viscount Sankey shows that there is no room for an argument which was at least adumbrated on behalf of the respondent in the instant appeal to the effect that the principle of Thomas does not apply to the appeal to the Federal Court because it is the appeal by way of rehearing - Courts of Judicature Act 1964 s. 69. Their Lordships would add that the instant case falls within the class referred to in the quotation from *Clarke v. Edinburgh Tramways Co* [1919] SC 35 (HL) at p. 36 in which the judge has announced as part of his judgment that he believes one set of witnesses and disbelieves the other.
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(28) And this very passage was cited with approval by the Brunei Court of Appeal in the case of *Hanshim Corp Sdn Bhd v. New York Plastic Co Pte Ltd* [1990] 1 MLJ 345 (CA).

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(29) In *Watt or Thomas v. Thomas* [1947] AC 484 (HL), all the Law Lords wrote separate judgments. However, the judgment of Lord Thankerton deserves mention. There at pp. 487-488, His Lordship set out the approach to be adopted by the appellate court in these erudite terms:

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I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:

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I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion: II) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence: III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of the case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves; and, further, within that class, cases of alleged cruelty will afford an even stronger example of such advantage. Normally the cruelty is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no footrule by which to measure the personalities of the spouses. In cases such as the present, it will be almost invariably found that a divided household promotes partisanship, and it is difficult to get unbiased evidence.

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A [149] Continuing at pp. 20 to 21, His Lordship itemised those authorities one by one:

(30) These fundamental principles of law have been applied vigorously in numerous cases. Suffice for us to make mention of only two of them, namely:

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(a) *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 30 MLJ 87 (HC) Singapore, CA Singapore, and Privy Council; and

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(b) *Gan Yook Chin (p) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC) Malaysia.

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(31) Now, where the credibility of witnesses is not an issue and the only concern of the Court of Appeal is to determine whether the trial judge has drawn proper inferences from the facts, the Court of Appeal is in just as good a position as the trial judge to evaluate and assess the evidence. In these circumstances, the appellate court will give the appropriate weight to the opinion of the trial judge but at the same time it may form its own independent opinion on the inferences to be drawn.

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(32) Lee Hun Hoe (CJ Borneo) speaking for the Supreme Court in *Yeap Leong Huat v. Yeap Leong Soon & Anor And Another Application* [1989] 3 MLJ 157, aptly said, at p. 161 of the report:

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An appellate court should not interfere with the finding of facts by the learned judge who has seen and heard the witnesses and is in a better position to assess their credibilities. On the other hand, the defendants contended that the learned judge erred primarily in drawing the wrong inferences from established facts. It is trite law that, on the question of evaluation of facts, the appellate court is in as good a position as the trial judge to evaluate those facts:

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Watt v. Thomas [1947] All ER 582; *Benmax v. Austin* [1955] 1 All ER 326; *Tithes Dental & Photo Supply Sdn Bhd v. Empresa Lineas Maritimas Argentinas & Ors* [1977] 2 MLJ 13; *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41. An appellate court can also review a trial court's

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decision if the reasons are unsatisfactory and contradictory: *Lim Kim Chet & Anor v. Multar bin Masngud* [1984] 2 MLJ 165 or if in reaching its conclusion the learned judge has not properly analysed the entirety of the evidence which was given before him: *Choo Kok Beng v. Cho Kok Hoe &*

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Ors [1984] 2 MLJ 165.

(33) Edgar Joseph Jr SCJ delivering the majority judgment of the Supreme Court in *Sundram v. Arujunan & Anor* [1994] 3 MLJ 361, had this to say at p. 373 of the report:

By way of postlude, we must add a final point regarding this part of the case lest we be accused of an oversight. We recognise, as we must, that a Court of Appeal will naturally be reluctant to interfere with a finding of fact by the trial judge who has had the inestimable advantage of watching the demeanour of the witnesses, 'their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial' (per Lord Macmillan in *Watt v. Thomas* [1947] AC 484 at pp. 490-491; [1947] 1 All ER 582 at p. 590). But, having said that, we would draw attention to the familiar principle that there is a distinction between the finding of a specific fact and the finding of a fact which is really an inference drawn from the facts specifically found. In the latter case - and the present case is such a case - the appellate court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts (see *Benmax v. Austin Motor Co Ltd* [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418).

(34) In *Sivalingam a/l Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395 (CA), this court speaking jointly through Gopal Sri Ram and Mahadev Shankar JJCA rightly said at pp. 398-399 of the report:

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

(35) The Singapore Court of Appeal in *MK (Project Management) Ltd v. Baker Marine Energy Pte Ltd* [1995] 1 SLR 36, echoed the same sentiments as seen at the headnotes at p. 37. There it was stated that:

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A (1) Appellate courts are exceedingly slow to overturn findings of fact based on evidence given by witnesses which the trial judge had the advantage of hearing first-hand but this reluctance is not quite so pronounced when the findings of fact are actually inferences made from primary facts which are not in dispute. The learned judicial commissioner's findings that there was no certainty as to when the commission was to become payable and that no commission was payable until the financial package was finalised, fell into the latter category. It was far from clear that the letters suggested that the commission would only become payable if the financial package was finalised. At the same time, the respondents never pleaded that the parties had agreed to the commission being conditional upon the financial package being arranged. It was not open to the learned judicial commissioner to make this finding of fact in the absence of an amendment to the pleadings.

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[150] Appellant intervention must be the order of the day and accordingly we declare that the notice of termination dated 20 August 2002 of the following agreements are bad or wrong in law:

- E** (a) the JVA dated 12 January 1991;
- (b) the irrevocable PA dated 28 August 1991;
- (c) the first supplementary agreement dated 13 July 1992; and
- F** (d) the second supplementary agreement dated 20 June 1997.

[151] In our judgment, the termination by SAP was wrongful and the learned JC erred when His Lordship held that SAP was entitled to terminate those agreements.

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[152] For the reasons alluded to in this judgment, we unanimously allow the appeal of Cergas Tegas with costs of RM50,000 against SAP and costs of RM10,000 against Star Everest. We also unanimously dismiss SAP's counter-claim. Accordingly, we set aside all the orders of the learned JC.

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[153] For the avoidance of doubt, we make the following orders:

- (i) A declaration that the termination of the agreements are unlawful (see relief (a) in the 185 suit at p. 43 of the appeal record at "A").
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- (ii) A declaration that the revocation of the PA is unlawful and a consequential order that the PA is still valid and binding on SAP (see relief (c) in the 185 suit at p. 43 of the appeal record at “A”). **A**
- (iii) Specific performance of the agreements and for the following consequential orders and subject to payment of the balance of the purchase price equivalent to RM14,322,173 by Cergas Tegas to SAP and subject to Cergas Tegas redeeming the said land upon payment of the redemption sum without prejudice to Cergas Tegas’s rights to damages against SAP and also subject to the status of the forfeiture of the said land by the Selangor State Authority, SAP do execute and/or forward the following documents to Cergas Tegas: **B**
- (a) A valid and registrable memorandum of transfer of the said land held under HS (D) 20034, PT 26549, Mukim Batu, Daerah Gombak, Negeri Selangor. **C**
- (b) The original issue document of title of the said land free from all encumbrances. **D**
- (c) All other documents which have been or will be forwarded to SAP’s solicitors by Cergas Tegas solicitors for the purpose of effecting the transfer of the said land to Cergas Tegas (see reliefs (d) and (e) in the 185 suit at pp. 43 to 44 of the appeal record at “A”). **E**
- (iv) Damages, in addition to specific performance, to be assessed by the Senior Assistant Registrar of the High Court (see relief (f) in the 185 suit at p. 44 of the appeal record at “A”). **F**
- (v) Cergas Tegas be given liberty to apply (see relief (i) in the 185 suit at p. 45 of the appeal record at “A”). **G**
- (vi) An injunction restraining SAP from disposing the said land to Star Everest (see relief (a) in the 280 suit at p. 176 of the appeal record at “A”). **H**
- (vii) An injunction restraining Star Everest from trespassing into the said land (see relief (e) in the 280 suit at p. 77 of the appeal record at “A”). **I**

- A** (viii) An Order that SAP deliver vacant possession of the said land to Cergas Tegas upon receipt of the balance of the purchase price.

B [154] Learned counsel for the parties herein have greatly assisted us in arriving at our decision and we are grateful to them. Our judicial appraisal of the evidence and the law are made easier by their assistance.

C [155] My learned brothers Syed Ahmad Helmy bin Syed Ahmad JCA and Abdul Aziz bin Abd Rahim JCA have seen this judgment in draft and they have expressed their concurrence with it. And they too agreed that it should be the judgment of the court.

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